

BEFORE THE
GOVERNING BOARD OF
LEMON GROVE SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of
Certain Employees of Lemon Grove School
District Identified in Appendix A.

OAH No. 2011030915

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Lemon Grove, California, on April 21, 2011.

William Diedrich, Atkinson, Andelson, Loya, Rudd & Romo, Attorneys at Law, represented Lemon Grove School District ("District").

Georgiana D'Alessandro, Tosdal, Smith, Steiner & Wax, represented all of the Respondents listed in Appendix A, except for those identified immediately below. Attorney D'Alessandro also represented three temporary teachers who the District sought to release.

Respondent Larry Buchanan appeared and represented himself.

Respondent Irma Poulin requested a hearing but did not appear and was not represented.

Respondent Susan Farnsworth was served with a precautionary layoff.

Each Respondent is a certificated employee of the district.

The matter was submitted on April 21, 2011.

FACTUAL FINDINGS

1. Ernest Anastos, Superintendent, Lemon Grove School District, made and filed the accusation in his official capacity.

2. The respondents that the District identified as permanent certificated employees are listed in Appendix A, attached hereto and by this reference are incorporated herein. Each respondent is a certificated employee of the District.

3. On March 8, 2011, the Governing Board adopted Resolution No. 10-11-19 reducing particular kinds of services and directing the Superintendent to give appropriate notices to certificated employees whose positions would be affected by the action. Attached to the Resolution as Exhibit A was a list of the services that were being reduced, consisting of 9.0 regular certificated FTEs and 35.76 temporary FTEs. The District sought to release its temporary employees and noted that the “inclusion of temporary services within this Resolution is not intended to grant these individuals who are impacted any rights greater than provided by law, nor to nullify any provisions within each individual’s employment contract, nor to supersede any other Resolution by this Governing Board to release or otherwise terminate the services of any impacted individual.”

4. The Resolution contained “skipping criteria” directing the District to use “criteria within Education Code section 44955, subdivision (d)” to “deviate from terminating a certificated employee in order of seniority” as follows:

“WHEREAS, this Board has determined that due to a significant population of English language learners with specialized educational needs, a specific and compelling need exists to retain certificated employees who have Bilingual Cross-cultural Language Arts Development (“BCLAD”) authorization to teach English language learners and the special training and experience that comes therewith; and

“WHEREAS, this Board has determined that due to a significant population of English language learners with specialized educational needs, a specific and compelling need exists to retain certificated employees who teach in the District’s bilingual dual immersion program and therefore possess the special training and experience that comes therewith; and

“WHEREAS, this Board has determined that there is a significant and compelling need to retain teachers who have attained National Board Certification, and therefore possess the training and experience that comes therewith...”

5. Resolution No. 10-11-19 contained tie-breaking criteria to determine the order of termination for those employees who shared the same seniority dates. The District was not required to use these criteria to break any actual ties in this proceeding.

6. Resolution No. 10-11-19 contained a bump analysis to determine which employees could bump into a position being held by a junior employee. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or

she is certificated and competent to fill. In doing so, the senior employee may displace or “bump” a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469, 473-474.) Resolution No. 10-11-19 defined “competency” for the purposes of bumping as:

“possession of: (1) a valid credential in the relevant subject matter area; (2) “highly qualified” status under the No Child Left Behind Act in the position to be assumed; (3) if displacing an employee who possesses a BCLAD certification, possession of a BCLAD certification; (4) special training and experience necessary to meet the job requirements of specialized positions (such as AVID teachers, EDP lead teachers, Dual Immersion teachers); (5) if displacing an employee who possesses a National Board Certification, possession of a National Board Certification; (6) for elementary (K-5) teaching positions, or a self contained 6th grade classroom teaching position, at least (1) year of experience in the past five (5) years teaching at the elementary level or in a sixth grade self contained classroom; and (7) for positions involving instruction to 6th, 7th and/or 8th grade students, other than a self contained 6th grade classroom, at least one (1) year of experience in the position or assignment within the last five (5) years.”

7. On March 8, 2011, the Governing Board adopted Resolution No. 10-11-20 determining that 62 presently employed temporary certificated employees, identified by employee number in Resolution No. 10-11-20, shall not be reemployed for the 2011-2012 school year and directing the Superintendent to give appropriate notices to certificated employees whose positions would be affected by the action. The District sought to release those temporary employees in this proceeding.

8. Consistent with the Governing Board’s Resolutions, the District identified certificated employees for layoff. The decision to reduce or discontinue a particular kind of service is a matter reserved to the district’s discretion and is not subject to second-guessing in this proceeding. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.) A school district’s decision to reduce a particular kind of service will be upheld unless it is fraudulent, arbitrary or capricious. (*San Jose Teachers Association v. Allen* (1983) 144 Cal. App. 3d 627, 637.)

9. The District considered attrition, including resignations, retirements and requests for transfer, in determining the actual number of necessary layoff notices to be delivered to its employees. No evidence was presented that any known positively assured attrition was not considered.

10. On or before March 15, 2011, the District timely served on Respondents a written notice that the Superintendent had recommended that their services would be terminated at the close of the current school year. The reasons for the recommendation were set forth in these preliminary layoff notices.

11. The District also issued precautionary layoff notices to ensure that it could reduce its force in sufficient numbers as ordered by the Governing Board. There was nothing improper in the District taking this precaution.

12. An accusation was served on each respondent. All prehearing jurisdictional requirements were met.

13. The layoffs will not reduce any of the District's offerings in code mandated courses below the level required by law.

BCLAD and Dual Immersion Skipping Issue

14. Education Code section 44955, subdivisions (b) and (c), set forth a general rule requiring school districts to retain senior employees over more junior employees and to retain permanent employees over temporary employees. Any exception to this general rule must be based on statute. Education Code section 44955, subdivision (d) provides:

“(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.”

15. Under Education Code section 44955, subdivision (d)(1), the District may skip a junior teacher being retained for specified reasons. (*Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127, 131.) Junior teachers may be given retention priority over senior teachers only if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842-843.) A junior employee possessing special competence can be retained over a senior employee lacking such competence. (*Alexander v. Delano Joint Union High School District* (1983) 139 Cal.App.3d 567.) The Resolution skipped certificated employees who possessed a BCLAD certification or taught the Spanish portion of the dual immersion program who were junior to respondents.

16. Superintendent Ernest Anastos testified that forty percent of students in the

District are English language learners, making it necessary to offer bilingual education to its students. Accordingly, the Resolution permitted the District to “skip” teachers who possessed a BCLAD or taught in the dual immersion program. The goal of the dual immersion program is to have students achieve bilingualism in Spanish and English. Superintendent Anastos testified that the District skipped teachers who taught in the Spanish portion of the dual immersion program.

17. The testimony of Superintendent Anastos established that the needs of the District required it to skip the certificated employees with a BCLAD or who taught Spanish in the dual immersion program.

Other Issues

18. During the hearing, the District determined that respondent Larry Buchanan’s assignment was incorrectly identified on the seniority list as an assistant principal and should properly identify him as a principal. It is recommended that District make that correction on its seniority list. This correction did not affect the District’s ability to lay him off in this proceeding and he cannot bump into a teaching position.

19. During the hearing, the District determined that respondent Kyle Griffith teaches a sixth, seventh and eighth grade curriculum, not a self-contained sixth grade assignment as previously presumed. Owing to that fact, the District determined that respondent Sarah Slade, who was more senior to Griffith and who possessed a supplemental authorization which would allow her to teach at the middle school level, could “bump” into Griffith’s teaching position. No respondent more senior to Slade was certificated and competent to bump Slade. As a result of Slade’s “bump,” respondent Susan Farnsworth, who initially received a precautionary layoff, will now be terminated from employment with the District as she has less seniority and cannot bump into any position held by a more junior employee.¹

20. No certificated employee junior to any respondent was retained to perform any services which any respondent was certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to sections 44949 and 44955, and all notices and other requirements of those sections have been provided as required.

2. A district may reduce services within the meaning of section 44955, subdivision (b), “either by determining that a certain type of service to students shall not,

¹ Susan Farnsworth declined to testify in this proceeding when given the opportunity by the Administrative Law Judge to do so.

thereafter, be performed at all by anyone, or it may 'reduce services' by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved." (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

3. Because of the reduction of particular kinds of services, cause exists pursuant to Education Code section 44955 to give notice to respondents that their services will not be required for the 2011-2012 school year. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949. The district has identified the certificated employees who are providing the particular kinds of services that the Governing Board directed be reduced or discontinued. It is recommended that the Governing Board give respondents notice before May 15, 2009, that their services will not be required by the District for the school year 2011-12.

4. A preponderance of the evidence sustained most of the charges set forth in the accusation.

RECOMMENDATION

It is recommended that the governing board give notice to the respondents whose names are set forth below that their employment will be terminated at the close of the current school year and that their services will not be needed for the 2011-2012 school year.

It is recommended that the District release the temporary employees identified in Resolution No 10-11-20 by employee number and who were identified by name in exhibit 12 introduced at hearing.

It is recommended that the Accusation served on respondent Sarah Slade be dismissed and her layoff notice be rescinded.

DATED: _____

MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings

Appendix A

1. Buchanan, Larry
2. Erlendson, Shari
3. Farnsworth, Susan
4. Griffith, Kyle
5. Moudry, Teresa
6. Poulin, Irma
7. Smith, Cynthia
8. Stack, Trisha